NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., JUDGE

DIVISION III

CA06-768

25 April 2007

MICHELLE CALDWELL STAAB, THE ESTATE OF WHIT ALEXANDER JOHNSON II, APPELLANT	AN APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT [PR-05-38]
v.	
BETTY MAINARD, ROBERT PULLIAM, PHILLIP PULLIAM APPELLEES	HONORABLE GORDON WILLIAM MCCAIN JR., JUDGE
	REVERSED

Whit Alexander Johnson II died testate in 2004 in Georgia leaving no wife or children. His will primarily benefitted his friend Julia Lorraine Caldwell, to whom he devised his home in Georgia and bequeathed all his personal property. Johnson also owned, with his cousins, a 403-acre farm in Franklin County, Arkansas. This farm had belonged to Johnson's grandparents, and was producing income from mineral rights. This case turns on the correct construction of Johnson's will about his interest in the farm and mineral rights.

I.

The disputed provision of Johnson's will states:

> ARTICLE III
>
> Distribution of Residue
>
> I give, devise and bequeath my Arkansas real estate to my cousins, per stirpes, however, this bequest shall not include the income from mineral rights whatsoever, which income shall be paid to JULIA LORRAINE CALDWELL, per stirpes.
>
> All the rest, residue and remainder of my property, real, personal and mixed, of whatever kind and character and wheresoever situated, of which I shall die seized or possessed or to which I shall be entitled in any way or in which I shall, at the time of my death, have any interest (including lapsed or void legacies and devises but excluding any property over which I have any power of appointment, it being my intention not to exercise any such power hereby), hereinafter, sometimes referred to as my residuary estate, I give, devise and bequeath, to my good friend, JULIA LORRAINE CALDWELL, of Fulton County, Georgia. If JULIA LORRAINE CALDWELL shall not survive me, I give, devise and bequeath all of my aforementioned residuary estate to the heirs-at-law of said JULIA LORRAINE CALDWELL, per stirpes.

After Johnson's death, the circuit court of Franklin County opened an ancillary probate proceeding and appointed Michelle Caldwell Staab (Julia Caldwell's daughter) personal representative. Betty J. Mainard, Robert R. Pulliam, Phillip W. Pulliam, and Ralph Johnson Jr. petitioned the court to declare that they were the "cousins" mentioned in Article III. They also asked the court to declare their ownership in fee of all the related mineral interest, subject only to Caldwell's right to receive—during her life—Johnson's share of the income from those minerals.

There was no dispute that these four people were the cousins mentioned in Johnson's will. Staab argued, however, that Caldwell was entitled to a full fee interest, not a life estate, in the mineral income. The circuit court rejected Staab's arguments and construed the will as the cousins requested. The court held that Article III unambiguously created a life estate in the mineral income to Caldwell with the

remainder to the cousins. Staab appeals. On de novo review, *Walburn v. Law*, 77 Ark. App. 211, 214, 72 S.W.3d 543, 545 (2002), we reverse.

II.

We begin, as did the circuit court, with the polestar legal principle: we must discern and implement Johnson's intentions as he expressed them in his will. *Sutton v. Milburn*, 289 Ark. 421, 428, 711 S.W.2d 808, 812 (1986). We are not looking for the testamentary intentions in Johnson's mind, but for his intentions as he expressed them in the words of his entire will. The circuit court concluded that Article III was unambiguous. We agree. We disagree, however, with the circuit court's construction of this provision and the resulting disposition of the remainder interest in Johnson's mineral income from the farm. The first paragraph of Article III does not dispose of that remainder interest, and thus it passes to Caldwell under what the cousins acknowledge is the will's clear residuary clause.

Johnson devised the farm and mineral rights to his cousins with an exception. *Bodcaw Lumber Co. v. Goode*, 160 Ark. 48, 54, 254 S.W. 345, 346 (1923). This "bequest shall not include the income from mineral rights whatsoever, which income shall be paid to JULIA LORRAINE CALDWELL, per stripes." The will is clear: though the cousins are to receive most of Johnson's mineral rights, they are not to receive any income from those rights. The cousins, like the circuit court, do not acknowledge the power of the word Johnson chose to define the interest he excepted from the devise to his cousins. The cousins were to receive no mineral income "whatsoever." The exception in the devise means the cousins never received the right to mineral income to begin with, and more: it means Johnson did not intend for them to take as remaindermen. Johnson's emphatic and clearly expressed intention eliminates any inference or implication that he wanted his cousins to receive the mineral income after Caldwell's death.

The cousins argue that this division of the various rights associated with the minerals makes no

sense and leaves them with only a shell. We disagree. First, it is not our office to question the wisdom of Johnson's intentions, only to determine and effect them. *Jackson v. Robinson*, 195 Ark. 431, 433, 112 S.W.2d 417, 418 (1938). Second, the other mineral rights besides income—the executive right, the development right, and the like—are valuable and give the cousins an important measure of control over the minerals on this ancestral family farm. As Staab argues, it is not unreasonable to conclude that Johnson desired to maintain the status quo with Caldwell standing in his place as to mineral income. Finally, Arkansas law allows the creation of a separate interest in mineral royalties. *Hanson v. Ware*, 224 Ark. 430, 274 S.W.2d 359 (1955).

We believe Article III is equally clear that Johnson bequeathed Caldwell only a life estate, not a fee interest, in the mineral income. We agree with the circuit court on this issue. Like that court, we are struck by other provisions of the will in which Johnson devised and bequeathed fee interests with clarity and exactitude. Staab suggests this reason is a *non sequitur*, but she is mistaken. In construing Article III, we must consider Johnson's entire will, and it is a legal commonplace in the construction of all writings—including wills—that a variance in provisions demonstrates an intention to treat different matters differently with full knowledge of the options. *Jackson*, 195 Ark. at 434, 112 S.W.2d at 419. Johnson's will shows he knew how to create a fee interest when he wanted to do so. And he did not do so for the mineral income.

Staab urges this court to take one of several roads in reading the first paragraph of Article III to grant Caldwell a full fee in the mineral income. None, however, is satisfactory. First, on the authority of *Cross v. Manning*, 211 Ark. 803, 807–08, 202 S.W.2d 584, 587 (1947), we could imply the phrase "or her heirs-at-law" into the grant to Caldwell. But we are reluctant to do so because a court should only supply missing words when the decedent's intentions are clear, and on this issue in this case they are not. Second, we could rely on *Union Trust Co. v. Madigan*, 183 Ark. 158, 166, 35 S.W.2d 349, 353

(1931), and hold that the grant of a life estate in the mineral income without a gift-over of the remainder effects a grant of a fee interest in that income. But Staab's authority for this proposition does not involve the already-divided interest we face in this case, and that difference likewise gives us pause. Finally, we could read the words "per stirpes" in the grant to Caldwell to indicate Johnson's intention to create a descendable interest. The difficulty with this reading is Johnson's inconsistent and sometimes incorrect use of this phrase throughout the will. Rather than take any of the routes suggested by Staab to a fee interest in the mineral income through the first paragraph of Article III, we conclude the best way to effect Johnson's intentions is to implement his will's residuary clause.

The second paragraph of Article III, which we quoted above, could not be any clearer. Johnson devised and bequeathed all his residuary estate "to my good friend, JULIA LORRAINE CALDWELL," or if she did not survive him, "to the heirs-at-law of said JULIA LORRAINE CALDWELL, per stirpes." We hold that Johnson did not dispose of the remainder interest in the mineral income from the farm in Franklin County in the first paragraph of Article III. That interest passed to Caldwell through the residuary clause.

Reversed.

GLOVER and BAKER, JJ., agree.